86-733

No.

In The Supreme Court of the United States

October Term, 1986

I. WALTON BADER and BADER AND BADER,
Petitioners,

vs.

ITEL CORPORATION and CLASS PLAINTIFFS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Where actions were taken by Petitioners, in the course of litigation, that were not only legally justified but where similar actions were held to be non-frivolous by the same Court in other litigation, and where said actions were held to be a partially correct statement of the law by another circuit and a totally correct statement of the law by two dissenting judges of the said other circuit, can Rule 11 sanctions be imposed on the attorneys for parties because of claimed "improper motivation" for the taking of such actions.

2. Is it "improper motivation" for filing legally justified objections to the expansion of a prior certified Federal class, and to the proposed settlement involved, where the expansion of the Federal class involved and the proposed settlement in behalf of the expanded Federal class will destroy the position of a State class involved in pending State Court Litigation.

3. Is it "improper motivation" for attorneys for a State Class to file legally justified objections in behalf of members of the State Class to the settlement of Federal Class litigation (which would destroy the rights of the State Class Members) in order to obtain compliance by the defendants in such litigation with prior agreements made by the defendants in the Federal Class Litigation, as a condition for the withdrawal of the objections with the said objectors in said litigation, that said defendants would not object to the payment of attorneys' fees to the attorneys for the State Class by the said defendants, either in the Bankruptcy Court or the State Court, which agreements were violated by the defendants.

4. Where the claimed "improper motivation" involves the claimed violation by the attorneys against whom Rule 11 sanctions wree imposed of claimed extra-judicial agreements between the said attorneys and the Federal Class Action Defendants does the resolution of this issue, which was contested on a factual basis, require a jury trial under the Seventh Amendment to the Constitution of the United States.

5. Where the imposition of Rule 11 sanctions requires factual findings to be made by a District Court, may a District

Court make such findings without an *evidentiary hearing* and does the fact that no such evidentiary hearing was held in this case violate the Fifth Amendment to the Constitution of the United States as a violation of substantive and procedural due process.

6. Is an agreement made by a prospective objector to the settlement of Class Litigation, not to take any further action to oppose the said settlement, nor to aid or assist any other party in objecting to such settlement, void as against public policy.

7. May a Court impose Rule 11 sanctions against an attorney for violation of a purported agreement when the agreement was obtained by the defendants by the threat of the institution of disciplinary proceedings against the attorney in violation of the Disciplinary Rules applicable to attorneys.

8. Is the utilization of the "improper motivation" test for the application of Rule 11 sanctions against an attorney taking legally justified actions a violation of the "Right of Petition" provided for in the First Amendment to the Constitution of the United States.

9. May a Court impose Rule 11 sanctions against an attorney where, prior to the making of an application for such sanctions, the attorney and his clients withdrew the claims made with the consent of the adverse parties and was no longer involved in such litigation.

10. Can a Court of Appeals impose sanctions on an attorney for an alleged "frivolous appeal" where some of the issues involved were not previously passed upon by any circuit and where other issues were claimed to have been passed upon by a circuit other than that in which the appeal was pending and which determination was in conflict with contrary determinations of another circuit.

LIST OF ALL PARTIES TO THIS PROCEEDING

The present petition is directed to post-judgment proceedings only which proceedings eventuated in the imposition of Rule 11 sanctions against the petitioners after the proposed settlemen of the underlying Class Action was approved by the Court. The parties to these post-judgment proceedings were the following:

FOR THE PETITIONERS

BADER AND BADER,
a law partnership

I. WALTON BADER
a member of BADER and BADER

FOR THE RESPONDENTS

DAVID B. GOLD,
a law corporation

DAVID B. GOLD, the sole stockholder of the GOLD corporation.

MILBERG, WEISS, BERSHAD, SPECTHRIE & LERACH, a law partnership

MELVYN WEISS, a member of the MILBERG law firm

WOLF, POPPER, ROSS, WOLF & JONES, a law partnership

ARTHUR ABBEY

(The parties above, who were lead Class Counsel in the Federal Class Action involved, were purportedly conducting these proceedings for the benefit of the Class involved.)

ITEL CORPORATION, one of the defendants involved in the Class Action participated in these post-judgment proceedings but sought no affirmative relief from the Court.

PETTIT & MARTIN, attorneys for ITEL CORPORATION, who were awarded Rule 38 sanctions by the United States Court of Appeals for the Ninth Circuit.

TABLE OF CONTENTS

Page

TABLE OF CASES

INDEX TO APPENDICES

In The Supreme Court of the United States

October Term, 1986

I. WALTON BADER and BADER AND BADER,
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OPINIONS OF THE COURTS BELOW

The decision of the District Court relating to the post-judgment proceedings from which this Petition for a Writ of Certiorari is taken was officially reported at 596 Fed. Supp. 226. The decision of the Court of Appeals affirming the decision of the District Court and awarding further sanctions against counsel has not yet been officially reported. Copies of these decisions appear in the Appendix to this Petition.

BASIS FOR JURISDICTION OF THIS COURT

This Court has jurisdiction to grant this Petition for a Writ of Certiorari pursuant to 28 USC 1254(1).

DATES OF THE VARIOUS PROCEEDINGS RELEVANT TO THIS CASE.

The following are the dates of the various proceedings which took place in connection with this case.

1. The decision of the District Court involving the post-judgment proceedings in this case was filed on October 16th, 1984.

2. A due and timely Notice of Appeal was filed to the United States Court of Appeals for the Ninth Circuit.

3. On April 8th, 1986 the United States Court of Appeals rendered a decision affirming the determination of the District Court.

4. A due and timely petition for *en banc* review was filed by the petitioners with the United States Court of Appeals for the Ninth Circuit. This petition was denied by the United States Court of Appeals for the Ninth Circuit on June 26th, 1986.

5. On July 8, 1986 the United States Court of Appeals for the Ninth Circuit awarded additional Rule 38 sanctions against the petitioners.

6. On August 27th, 1986 Mr. Justice Rehnquist of this court extended the time for the Petitioners to file a Petition for a Writ of Certiorari to and including November 5th, 1986.

7. Copies of the decisions of the courts below and the Order of this Court extending the time for the filing of a Petition for a Writ of Certiorari are contained in the appendix to this Petition.

CONSTITUTIONAL PROVISIONS AND RULES OF PROCEDURE WHICH THIS CASE INVOLVES

1. Rule 11 Federal Rules of Civil Procedure.
2. Rule 38 Federal Rules of Appellate Procedure.
3. US Constitution Amendment 1.
4. US Constitution Amendment 5.
5. US Constitution Amendment 7.

True copies of these documents will be found in the Appendix to this Petition.

STATEMENT OF THE CASE

In setting forth the Statement of this case the Petitioners are aware of the claim made by the Court of Appeals that they "mis-stated" the record before the District Court. It is and was the position of the Petitioners, and urged in this Petition, that the purported "findings" of the District Court that were contrary to the statements contained in the Petitioners' position before the Court of Appeals were based upon *disputed* facts

which were purportedly "found" by the District Court without an evidentiary hearing being held to resolve the disputed issues.

However, in reciting the facts in this case, the opinion of the District Court will be followed, and where the facts recited in the opinion are believed to be erroneous or immaterial since they were based on disputed facts without an evidentiary hearing, such matters will be pointed out in the present recital of facts.

Because the factual pattern in this case is lengthy and complicated, and space is limited in this Petition, the Petitioners will recite only most significant facts that appear to be material to the issues in this Petition.

The "Record Excerpts" as utilized by the Petitioners before the Court of Appeals will be referred to in the present statement of the case. These are submitted as an Exhibit to this Petition. A further copy of these "Record Excerpts" will be certified by the Court of Appeals and sent to this Court in due course.

On August 16th, 1979 the first of a number of Federal Class Actions were filed against ITEL CORPORATION, its officers and various other defendants for alleged violations of the Federal Securities Acts. The Class claimed and originally certified in the Federal Class Action consisted of the holders of the Securities of *ITEL CORPORATION.*

The attorneys for the Class Plaintiffs further limited the Class involved to those parties who had purchased the securities of ITEL CORPORATION during a specific time period.

(ITEL CORPORATION, during the course of these proceedings, filed a voluntary Petition in Bankruptcy).

The Bankruptcy Petition, however, did not include its subsidiary *ITEL INTERNATIONAL FINANCE N.V.* (a Netherlands Antillies Corporation). This corporation had issued its own series of bonds to public investors.

Clients of the Petitioners (who termed themselves the AD HOC PROTECTIVE COMMITTEE FOR THE EUROBOND DEBENTURES OF ITEL INTERNATIONAL FINANCE, N.V., hereinafter the "COMMITTEE,") held millions of dollars in face value of these debentures. However they purchas-

ed them *after* the "Class Period" set forth in the Federal Class Action.

Since the Federal Class Action did not include the holders of the debentures of the ITEL N.V. subsidiary, and since the Federal Class Action only included those parties who had purchased the ITEL CORPORATION securities during a specific time period, the Petitioners' clients were not concerned with the progress of the Federal Class Action. However, on July 7th 1982, these petitioners brought suit in the Delaware State Courts against ITEL NAVIGATION FINANCE, a Delaware Corporation, which, while a subsidiary of ITEL CORPORATION, was not in bankruptcy proceedings. The action also named various officers, directors and employees of ITEL CORPORATION and was brought as a Class Action in behalf of the present holders of the ITEL INTERNATIONAL DEBENTURES.

The docket entries of this action appear in the Appendix to this petition.

Prior to June 2nd, 1983 the Petitioners were informed that the proposed Class previously certified in this case was to be broadened on consent to involve the holders of the ITEL INTERNATIONAL DEBENTURES and that the action would be settled to grant general releases to all defendants in the Class Action (which would include the defendants in the Delaware State Litigation and thus would destroy the rights of the Class Members in the Delaware State Litigation. As a result on March 29, 1983 an application was made to the District Court to redefine the plaintiff class and to appoint a new class representative for the Eurobond Claims.

This motion never came to hearing because in the interim between the making of the motion and the hearing date, ITEL CORPORATION (through one SEYMOUR LICHT and STANFORD PHELPS) had agreed that, if the objections were not pressed and the original Federal Certified Class broadened to include the holders of the EUROBOND DEBENTURES then ITEL CORPORATION would, in effect, pay the attorneys' fees and expenses incurred by the COMMITTEE both in the Delaware State Litigation and in the Federal Bankruptcy Litigation, as well as granting the Eurobond Debenture Holders additional dividends in the Bankruptcy Litigation.

This agreement was made without the participation of the Petitioners' at the suggestion of ITEL CORPORATION and over the objections of the Petitioners.

On April 29th, 1983 the said ITEL CORPORATION and the purported Federal Class Attorneys submitted a proposed letter agreement to be signed which was at variance with the oral agreement that had purportedly been reached by the Committee with ITEL CORPORATION. Thus, on April 30th, 1983 the Petitioners wrote a letter to ITEL CORPORATION informing them that the proposed letter agreement was totally unsatisfactory.

Thereafter an officer of ITEL CORPORATION, one TWOMEY, informed LICHT that the prior agreement with respect to fees involved was still in effect and would be honored by ITEL CORPORATION. Based on these false representations, LICHT, in direct contravention of the advice of the Committee's counsel, signed this agreement.

Thereafter on May 17th, 1983 ITEL CORPORATION addressed a letter to the Petitioners stating that the Petitioners agreed not to object to the broadening of the prior certified class and the proposed settlement of the ITEL SECURITIES LITIGATION. The letter, of course, *failed to state that ITEL CORPORATION would not object to the payment of the fees and expenses of the Committee in both the Bankruptcy Court and the Delaware State Court.* This letter was never signed by the Petitioners.

However, based on the representations of LICHT that, in fact, ITEL CORPORATION had made such an agreement with the Committee, the proposed objections were withdrawn and, on June 2nd 1983 the District Court entered an order broadening the proposed class and permitting a proposed settlement to be circulated to the Class Members for approval.

Once ITEL CORPORATION had the objections withdrawn, they then felt free to repudiate their agreement and, in fact, object to the payment of the Committee's fees and expenses in the Bankruptcy Court and the Delaware Court.

Based on this clear breach of faith objections were again filed by the Petitioners to the proposed settlement of the Class Action.

When these objections were filed the attorneys for ITEL CORPORATION, in violation of the Canons of Ethics, threatened the Petitioners with Disciplinary Action. As a result of this threat, and particularly in view of the signature of LICHT on the agreement involved, the objections to the settlement of the Federal Class Action were withdrawn by the Petitioners and the Petitioners had no further involvement in the case.

At this point a written agreement was entered into between the Petitioners and ITEL CORPORATION (but not with Class Counsel) the agreement was made in the State of Delaware and provided that the Petitioners would not further oppose the settlement of the ITEL SECURITIES LITIGATION or aid and assist any other party in doing so. ITEL CORPORATION, on its part, agreed not to oppose the *jurisdiction* of the Delaware Court to award fees.

Thereafter objections were filed to the ITEL SECURITIES LITIGATION by one MURPHY, with whom the Petitioners had prior involvement and who, with the acquiesence of ITEL CORPORATION, tracked the objections previously filed by Petitioners. MURPHY's clients, however, held a different type of bond than the bonds of the Petitioners' clients.

After MURPHY's objections were overruled he appealed to the Court of Appeals. The Notice of Appeal was prepared by MURPHY. Class Counsel then, in an unlawful attempt to deprive MURPHY's clients of their right of appeal, obtained a temporary restraining order against distribution of the ITEL BANKRUPTCY proceeds to the Committee members. Murphy did, subsequently, withdraw his appeal.

Extensive post-judgment proceedings were then commenced by the District Court at the request of Class Counsel for alleged "abuse of process" and for Rule 11 sanctions against LICHT, PHELPS, and the Petitioners. Class Counsel thereafter released LICHT and the Court failed to sanction PHELPS. The Court denied both an evidentiary hearing and a jury trial and awarded $10,000 in Rule 11 sanctions in favor of ITEL CORPORATION (who did not request them) against Petitioners.

The Court of Appeals, holding the appeal involved as "frivolous" awarded a further sanction of $8,000 in favor of

Class Counsel against Petitioners and a further sanction of $4,500.00 in favor of counsel for ITEL CORPORATION against Petitioners.

REASONS FOR THE ALLOWANCE OF A WRIT OF CERTIORARI IN THIS CASE

A. Why it is necessary that this Court immediately consider the questions raised in this Petition.

1. While Petitioners, as attorneys, are understandably concerned that their conduct of litigation in order to protect their client's interests are criticized by the Courts below, and, of course, a total sanction of $30,000 is not inconsiderable and represents considerable financial hardship to the Petitioners, the issues in the case are far more important than correction of a mere erroneous determination of a District Court and a Court of Appeals.

2. Both District Courts and Courts of Appeals have been imposing substantial sanctions on parties and their attorneys for the bringing of "frivolous claims" or "frivolous appeals." Where the "frivolity" of the claims brought is clear Courts have held that such sanctions do not offend the "right of petition" provisions of the First Amendment.

3. However some Courts are now imposing FRCP RULE 11 and FRAP Rule 38 sanctions on parties and attorneys, as in this case, not because the actions taken were not justified, but because they were taken for an "improper purpose." If such actions on the part of the lower courts are not limited by this Court, the right of access of litigants, particularly those of limited means, will be severely restricted. Such misinterpretation of Rules 11 and 38 clearly is a violation of the First Amendment.

4. In the case at Bar, of course, there have also been Fifth Amendment violations in the Rule 11 proceedings because disputed factual issues were determined without an evidentiary hearing.

5. There have been Seventh Amendment violations because the issues involving the claimed violation of Rule 11 on the part of the Petitioners required a jury trial for their resolution.

B. The determination of the Court of Appeals for the Ninth Circuit in this case conflicts with determinations of the

Court of Appeals for the Second Circuit in similar cases requiring the definitive resolution of the conflict by this Court.

1. The Second Circuit, in two cases, to wit, *Wilmorite, Inc. v. Eagan Real Estate, Inc.*, (DCNDNY 1977) 454 Fed. Supp. 1124 affirmed 578 F. 2nd 1372, cert. den. 439 US 983 and *Browning Debenture Holders Committee v. DASA Corp.*, 2 Cir. 560 F. 2nd 1078 has held that Rule 11 sanctions cannot be applied unless the suit involved is "entirely frivolous." These determinations are now in conflict with the present determination of the Ninth Circuit that the "motive" of a party in prosecuting a valid claim is to be considered in applying Rule 11 sanctions.

2. The Court of Appeals for the Ninth Circuit could not have held the actions taken by the Petitioners to be "frivolous" since the position taken by the Petitioners, insofar as State Claims were concerned, was sustained by a majority of Judges of the United States Court of Appeals for the Third Circuit in *Lowry v. Baltimore & Ohio RR Co.*, 3 Cir., 707 F. 2nd 721 and sustained with respect to Federal Claims by two dissenting Judges of that Court.

3. The merits of the claims involved were also sustained by the Court of Appeals for the Ninth Circuit in *Phelps v. Continental Bank*, 772 F. 2nd 1486.

C. The United States Court of Appeals for the Ninth Circuit has so departed from the accepted and usual course of judicial proceedings and has further sanctioned such a departure by the United States District Court for the Northern District of California as to call for an exercise of this Court's power of supervision in regard to the following matters:

1. In holding that a District Court can award Rule 11 sanctions for legitimate objections because of "improper motive."

2. In depriving a party in a Rule 11 proceeding where the facts are contested from having an evidentiary hearing.

3. In depriving a party of a right to jury trial in a Rule 11 proceeding where the factual issues involve claimed contractual violations.

4. In failing to consider the validity of the alleged contract claimed to have been violated on "public policy" grounds.

5. In failing to consider the First Amendment questions involved in applying Rule 11 sanctions against attorneys asserting validly presentable claims, the Constitutional Questions having been duly raised before the Court.

6. In applying Rule 38 sanctions for an alleged "frivolous appeal" where the questions raised had never been previously considered by the Court of Appeals before whom they were raised.

THE PETITIONERS' ARGUMENTS SUPPORTING THE ALLOWANCE OF A WRIT OF CERTIORARI IN THIS CASE

POINT ONE

SO LONG AS THE ACTION TAKEN BY A LITIGANT OR HIS ATTORNEY HAS A RATIONAL BASIS THE IMPOSITION OF RULE 11 SANCTIONS ON THE GROUND OF IMPROPER MOTIVE ARE NOT PROPER AND VIOLATE THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The pertinent portions of Rule 11 FRCP (as amended April 28, 1983) read as follows:

> "*** The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. ***"

The provisions of Rule 11, of course, must be interpreted in accordance with the First Amendment to the Constitution of the United States which provides for the right of all citizens to peaceably petition the Government for redress of grievances.

While some Courts have held that sanctions for the filing of "frivolous claims" are authorized despite First Amendment

strictures, (Cf. *Larsen v. Commissioner,* 9 Cir. 765 F. 2nd 939 (1985); *Connor v. Commissioner,* 2 Cir. 770 F.2nd 17 (1985) Petitioners submit that to permit Rule 11 sanctions to be applied by a Federal Court against counsel and/or a litigant merely because of claimed "improper motives" on the part of either of said parties, despite the fact that the claims are legally supportable flies in the face of the First Amendment protections.

This constitutional point was duly raised before the Court of Appeals and rejected by it in its opinion.

It must be conceded in this case, that the determination of the District Court imposing Rule 11 sanctions on the Petitioners, the affirmance of that ruling by the Court of Appeals for the Ninth Circuit and the holding by the Ninth Circuit that the appeal was "frivolous" were all based on the findings by the District Court that the actions taken by the Petitioners were taken for the purpose of obtaining fee related concessions in other litigation, and that the conceded legal justification for the actions taken was not a defense to the imposition of such sanctions because of the "improper motive" of the Petitioners.

However, as has been held in many prior cases, the motives of a party in taking legally justified actions, cannot be the basis for sanctions.

This Rule, of course, is the Second Circuit Rule (where the Petitioners principally practice law) and is set forth in *Browning Debenture Holders Committee v. DASA, supra,* and *Wilmorite, Inc. v. Eagan Real Estate, Inc., supra.*

The same Rule applies in California in "abuse of process" cases. See, for example, *Coy v. Advance Automatic Sales Co.,* 39 Cal. Reptr. 476; *Fairfield v. Hamilton,* 24 Cal. Reptr. 73; *Muller v. Muller,* 23 Cal. Reptr. 900 and *Clark Equipment Co. v. Wheat,* 154 Cal. Reptr. 874.

In *Wilmorite, Inc. v. Eagan Real Estate, Inc., supra,* the District Court opinion, which was affirmed by the Court of Appeals for the Second Circuit, held, on page 1131, as follows:

> "*** The First Amendment right of petition guarantees all citizens the right to appeal to the legislature or judiciary. *This right is not conditioned upon motive****" (emphasis supplied).

APPENDIX A—OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DISTRICT OF CALIFORNIA

IN RE ITEL SECURITIES LITIGATION

This Document Relates to All Actions

No. C-79-2168 RPA

OPINION AND ORDER

ORIGINAL FILED OCT 16, 1984, WILLIAM L. WHITTAKER, CLERK, U.S. DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE

This case was a massive class action against the Itel Corporation. Class plaintiffs alleged that Itel had committed numerous violations of federal and state securities laws. In June 1983, the major parties agreed to a settlement of the securities litigation and on August 18, 1983, the Court approved the settlement and entered an order of dismissal.

The case is currently before the Court on class plaintiffs' request for attorneys' fees, costs, and sanctions against certin individuals. Class plaintiffs allege that these individuals abused this Court's process and acted in bad faith by attempting to disrupt the settlement of the securities litigation.

The parties to this post-judgement proceeding have engaged in extensive discovery. Further, the Court has heard and resolved a number of motions with respect to this matter. Finally, on April 19, 1984, the Court conducted a hearing on the merits of class plaintiffs' request for attorneys' fees, costs, and sanctions. The Court received documentary evidence and heard the argument of the parties. Based on the written and oral argument of the parties, and on the voluminous evidence in the record, the Court enters the following Opinion and Order.

FACTS

The facts of the underlying securities case are extremely complex and are not relevant to the instant request for attorneys' fees, costs, and sanctions. However, for purposes of this decision, a limited recitation of the facts will suffice.

The principal focus in these post-judgment proceedings is the conduct of an attorney named I. Walton Bader.[1] Mr. Bader, a member of the New York bar, was involved on the periphery of *Itel Securities Litigation* for approximately two years. He was more integrally involved in other litigation involving the Itel Corporation. Others involved in the alleged wrongdoing include William F. Murphy, a Florida attorney,[2] Seymour Licht, Chairman of the Ad Hoc Bondholders Committee,[3] Alysia Kruger, Mr. Licht's daughter, and Stanford Phelps, a client of Mr. Bader's.

A dispute between holders of Itel Eurobonds and the Itel Corporation forms the background for the current conflict about the actions of Mr. Bader and others. In the earlier dispute, the Eurobond holders were represented by Mr. Licht as Chairman of the Ad Hoc Bondholders Committee and Mr. Phelps. Mr. Licht and Mr. Phelps retained Mr. Bader as attorney for the Ad Hoc Bondholders Committee.[4] After retaining Mr. Bader, however, Mr. Licht and Mr. Phelps proceeded to resolve the Eurobond dispute directly with the Itel Corporation. Mr. Bader was not involved in the final negotiations that resulted in the settlement of the Eurobond controversy.[5] The agreement that Mr. Licht and Mr. Phelps made with Itel seriously jeopardized Mr. Bader's application for attorneys' fees. In fact, the agreement appeared to result in Mr. Bader receiving no compensation for his work on behalf of the Ad Hoc Bondholders Committee.[6] Mr. Bader advised that Mr. Licht and Mr. Phelps should not enter into the agreement, but they did not heed this advice.

Because of their fear that Mr. Bader would receive no attorneys' fees for his work on behalf of the bondholder, Mr. Bader and Mr. Licht then turned their attention to the *Itel Securities Litigation.* From the deposition testimony it is apparent that neither Mr. Bader nor Mr. Licht had any substan-

tive interest in the *Itel Securities Litigation.* They did, however, see the securities case as a vehicle for obtaining the fees they were unable to get in the other litigation. Thus, in March 1983, Mr. Bader and Mr. Licht entered the securities litigation for the apparent purpose of obtaining fees for their work in the Eurobond dispute.

Mr. Bader was aware that class plaintiffs are the Itel Corporation had entered into serious settlement negotiations in early 1983. He was also aware that Itel's Plan of Reorganization could not become effective until the securities litigation was settled. In this respect then, Mr. Bader believed that he could exert some leverage over Itel by threatening the negotiations for settlement of the securities litigation.

Mr. Bader made this threat to the negotiations by filing a motion in the securities litigation on March 29, 1983. The motion, brought on behalf of See More Light Investments, a partnership operated by Seymour Licht, sought to have the Court redefine the plaintiff class and to appoint a class representative for the Eurobond claims. As Mr. Bader was well aware, however, the class definition issue had been resolved three years earlier and litigation notices had long since been mailed to the class.

The motion never came to a hearing before the Court. Rather, Mr. Bader and Mr. Licht reached an agreement with the Itel Corporation. In a letter agreement dated April 28, 1983, Mr. Licht agreed that:

> Neither the Eurobond Representatives nor any of them nor any agent, attorney or other representative of any thereof shall henceforth seek to appear, intervene or participate in the securities case, whether in the District Court or any other Court, in any manner. . . .

In return, Itel agreed that the Eurobond Representatives could seek fees in the Delaware state court action or in the reorganization case, but not in the securities litigation. After this agreement was signed, Mr. Licht ordered Mr. Bader to withdraw the motion filed on March 29, 1983.

Counsel for Itel also wrote to Mr. Bader concerning the agreement. The May 17, 1983 letter to Mr. Bader, apparently based on an earlier oral agreement, states that:

> In connection with the *Itel Securities Litigation,* you [Bader] had withdrawn on behalf of both of your clients, all motions currently pending in the District Court. You [Bader] have further agreed, on behalf of your clients, that you will take no further action of any kind in the *Itel Securities Litigation* in any Court. . . . You should be aware that all parties to the securities litigation are relying on the agreements you have made in proceeding with the Stipulation of Settlement in the securities litigation.

This, however, did not end Mr. Bader's activities in connection with the *Itel Securities Litigation.* In June 1983, the parties submitted the proposed settlement of the securities litigation to the Court, and the Court indicated its preliminary approval. A hearing on final approval of the settlement was set for August 18, 1983. However, before that hearing occurred, Mr. Licht and Mr. Bader made their presence felt again.

On August 4, 1983, a woman named Alysia Kruger filed an objection to the proposed settlement. Alysia Kruger is Seymour Licht's daughter, who by all accounts knows little if anything about the Itel matter. The Kruger objection was filed by Mr. Bader, appaarently at Mr. Licht's direction. In his deposition and in testimony before Judge King of the Bankruptcy Court, Mr. Licht admitted that he asked Mr. Bader to file the Kruger objection because he believed that Itel had breached an agreement by objecting to Mr. Bader's fee application in the Delaware case. In essence then, Mr. Licht has conceded that Mr. Bader filed the Kruger objection for a reason unconnected to the *Itel Securities Litigation.*

In response to the Kruger objection, Itel made further fee-related concessions in order to keep the final settlement of the securities litigation on track. Itel agreed to provide Mr. Bader with a declaration from William P. Twombey that stated that the Ad Hoc Bondholders Committee had conferred a substantial benefit on the bondholders and that it was through the ac-

tions of the Committee that the Eurobond dispute was resolved. (This was important to Mr. Bader and Mr. Licht as it would provide support for Mr. Bader's request for attorneys' fees for his work on behalf of the Bondholders Committee.) Mr. Bader, in return, promised to withdraw with prejudice any and all objections made by him or his client as to any aspect of the settlement of the securities litigation. Bader also agreed that he would not

> participate, directly or indirectly, in any proceeding relative to the *Itel Securities Litigation,* or file or cause to be filed any papers relative thereto in the United States District Court or any other court. Moreover, [Bader] will not assist counsel or others in connection with any objections to any aspect of the settlement of the *Itel Securities Litigation.*

Pursuant to this agreement, Mr. Bader withdrew the Kruger objection.

It was at this point that Mr. Murphy came into the securities litigation. To properly understand Mr. Murphy's involvement, it is necessary to backtrack and review the record with respect to Mr. Bader's relationship with Mr. Murphy.

In June 1983, Mr. Bader apparently contacted another client, John Haralambides, who operates a discount brokerage firm in Florida. Haralambides had access to clients who traded in Itel securities. Haralambides also had a relationship with William F. Murphy, a Florida attorney who did various legal and business tasks for Haralambides. Nevertheless, Mr. Bader, Mr. Haralambides and Mr. Murphy agreed that Mr. Murphy would represent *domestic* bondholders in the *Itel Securities Litigation.* Mr. Murphy testified that he had little if any experience in the securities field and was reluctant to become involved in this scheme at the outset. According to Mr. Murphy, Mr. Bader actively encouraged him to become involved in the action. Mr. Bader's conduct here appears to be in direct violation of the agreement with Itel as expressed in the May 17 letter from Itel's counsel.

In July 1983, Mr. Bader referred the President of W & F, Inc. to Mr. Murphy in connection with the President's interest in becoming involved in the Itel matter. Mr. Murphy's other clients were referred to him by Haralambides. Apparently, none of Mr. Murphy's clients were responsible for any of the costs involved in this litigation. Rather, Haralambides agreed to finance the objections to the settlement and any other actions that might become necessary. Further, according to Mr. Murphy, Mr. Bader agreed to provide him with expertise and advice in the event Mr. Murphy ever had to become truly involved in the Itel matter. This promise too was a violation of the agreement Mr. Bader had reached with Itel back in May 1983.

After Mr. Bader had wikthdrawn the Kruger objection, and Mr. Bader had once again promised to stay out of the securities litigation, Mr. Murphy became involved in the *Itel Securities Litigation.* According to Mr. Murphy's deposition, Mr. Bader contacted him immediately after withdrawing the Kruger objection. Mr. Bader urged Mr. Murphy to file an objection to the proposed settlement of the *Itel Securities Litigation.* Mr. Bader also told Mr. Murphy that he [Murphy] could use the Kruger objection as a model for his own objection.

On August 17, 1983, one day before the hearing on final Court approval of the settlement, Mr. Murphy filed basically the same objection that Mr. Bader had filed on behalf of Kruger. The deposition testimony strongly indicates that Mr. Murphy had little or no knowledge about the substance of the objection he filed. Further, his local counsel had spent extremely little time reviewing the relevant documents and was similarly uninformed about the substance of the objection.

On August 18, 1983, this Court conducted a final hearing on the proposed settlement. Although Mr. Murphy's objection was not timely filed, the Court considered it on the merits. The Court rejected Mr. Murphy's objection and approved the settlement as presented by counsel for the plaintiff class and counsel for the Itel Corporation. The documents the Court signed and filed on August 18, 1983 encompassed three separate agreements: the actual settlement between the corporation and the plaintiff class; the plan of allocation; and the award of fees and costs to counsel for the plaintiff class.

Mr. Murphy filed a Notice of Appeal with respect to each of the three orders entered by the Court on August 18. Mr. Murphy testified at his deposition that he had a number of telephone conversations with Mr. Bader in which Mr. Bader advised Mr. Murphy with respect to the appeals. In so doing, Mr. Bader once again violated his promise to stay out of the securities litigation completely.

Soon after Mr. Murphy filed his appeals, Mr. Licht told counsel for the plaintiff class that Mr. Bader was responsible for the appeals. Mr. Licht also suggested that he thought the appeals could be dismissed if class counsel consented to a redefinition of the class so that current bondholders would receive a portion of the settlement proceeds.

At this point, believing that Mr. Bader and Mr. Licht were again trying to essentially extort further fee-related concessions, counsel for the plaintiff class commenced these post-judgment proceedings. On September 26, 1983, class plaintiff sought and obtained a temporary restraining order enjoining the distribution of newly issued Itel securities to Mr. Bader, Mr. Licht, See More Licht Investments, and others. Very soon after the Court issued this injunction, Mr. Murphy withdrew his appeals. According to Mr. Murphy, this action was taken at Mr. Bader's direction, as passed through Mr. Haralambides.

Once Mr. Murphy dismissed the appeals, the settlement of the Itel Securities litigation became absolutely final. However, it was at this point that counsel for the plaintiff class began the extensive efforts to expose the wrongdoing perpetrated by Mr. Bader and his conorts.

JURISDICTION:

Since the inception of these post-judgment proceedings, Mr. Bader has questioned the Court's jurisdiction over class plaintiffs' request for attorneys' fees, costs, and sanctions. In his opposition to the request for attorneys' fees, costs, and sanctions, Mr. Bader once again challenges this Court's jurisdiction over the issues before the Court. The Court has rebuffed Mr. Bader's jurisdictional attacks from the beginning and does so again in this Opinion and Order.

Fifty years ago the United States Supreme Court said:

> That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled. *Root v. Woolworth,* 150 U.S. 401, 410-12; *Julian v. Central Trust Co.,* 193 U.S. 93, 112-14; *Riverdale Mills v. Manufacturing Co.,* 198 U.S. 188, 194 *et seq.; Freeman v. Howe,* 24 How. 450, 460. And this, irrespective of whether the court would have jurisdiction if the proceeding were an original one. The proceeding being ancillary and dependent, the jurisdiction of the court follows that of the original cause, and may be maintained without regard to the citizenship of the parties or the amount involved. . . .

Local Loan Co. v. Hunt, 292 U.S. 234, 239 (1934).

The instant proceeding falls within the *Local Loan* rule. The post-judgment proceeding is to preserve the integrity of this Court's judgments in general, and specifically to protect the Court's final judgment in the *Itel Securities Litigation. Accordingly, the Court finds that it has jurisdiction over the matters pending before the Court.*‡

THE COURT'S AUTHORITY TO GRANT THE RELIEF REQUESTED:

In *Roadway Express v. Piper,* the Supreme Court held that a district court has the inherent power to assess attorneys' fees against counsel. 447 U.S. 752, 765 (1980). The Court cautioned that the district court's inherent power should be narrowly defined and exercised with restraint and discretion. *Id.* 447 U.S. at 764-65. Thus, though the Court advised that the power should be used carefully and sparingly, the Court plainly recognized that district court could exercise their inherent authority to impose an award of attorneys' fees in the proper circumstances. *Accord, U.S. v. Blodgett,* 709 F.2d 608 (9th Cir. 1983).

Similarly, in *Alyeska Pipeline Co. v. Wilderness Society* the Court acknowledged the federal court's inherent power to assess attorneys' fees as part of a fine levied on the defendant for willfully disobeying a court order or for acting in bad faith, vexatiously, wantonly, or for oppressive reasons. 421 U.S. 240, 258-59 (1975) (citations omitted). Earlier, the Supreme Court held that "bad faith" is not limited to instances in which a complaint is filed in bad faith, but that conduct in the course of litigation may also constitute bad faith. *Hall v. Cole,* 412 U.S. 1, 15 (1973).

Based on the *Roadway Express* and *Alyeska Pipeline* decisions, the Court concludes that it possesses the inherent power to award attorneys' fees as a means of protecting the integrity of the judicial process and that this inherent authority extends to considering class plaintiffs' request for attorneys' fees, costs, and sanctions in this case.

Furthermore, the Court also possesses statutory authority to grant the relief requested by class plaintiffs. Section 1927 of Title 28 of the United States Code provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct.

Similarly, the new version of Rule 11 of the Federal Rules of Civil Procedure empowers the Court to impose appropriate sanctions against an attorney who signs and files a document that is interposed for an improper purpose.

THE MERITS OF CLASS PLAINTIFFS' REQUEST:

Having determined that it has jurisdiction over class plaintiffs' request, and that it has the authority to grant the relief requested, the Court turns now to consideration of the merits of the request for attorneys' fees, costs, and sanctions.

First of all, the Court finds that Mr. Bader's conduct in the *Itel Securities Litigation* is a proper subject for the imposition of attorneys' fees, costs, and sanctions. The Court finds that Mr. Bader's conduct falls far short of the standards to which this Court holds counsel. The Court finds that Mr. Bader's conduct in this litigation constitutes bad faith as described in *Hall* and *Alveska Pipeline.* Furthermore, the Court finds that Mr. Bader's conduct runs afoul of the requirements of Federal Rule of Civil Procedure 11. For these reasons, the Court has decided to grant the request for attorneys' fees, costs, and sanctions under 28 U.S.C. section 1927 and Rule 11 of the Federal Rules of Civil Procedure.

Pursuant to both 28 U.S.C. section 1927 and Rule 11, the extent of recovery is limited to the attorneys' fees and costs incurred because of the improper action. Section 1927 says that the attorney who commits the misconduct "may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." Further, the title of the section is *"Counsel's liability for excessive costs."* Similarly, Rule 11 speaks in terms of "an appropriate sanction which may include an order to pay the other party or parties the amount of the resonable expenses incurred because of the filing of the pleding, motion, or other paper, including resonable attorneys' fees." Thus, both section 1927 and Rule 11 contemplate reimbursement for the expenses necessarily incurred because of the misconduct. They do not contemplate an award of punitive sanctions. In other words, in making an award pursuant to section 1927 and Rule 11, the Court can only award fees and sanctions for expenses incurred in responsive or defensive actions. *See also U.S. v. Blodgett,* 709 F.2d 608 (9th Cir. 1983).

In the instant case, class plaintiffs and others were forced to expend considerable efforts to defend against Bader's wrongful actions. For these efforts, class plaintiffs and others

may be awarded attorneys' fees and costs pursuant to section 1927 and Rule 11.

Class plaintiffs also engaged in very considerable offensive actions in this post-judgment proceeding. In fact, this post-judgment proceeding is largely a creature of class plaintiffs' offensive actions against Mr. Bader and others. In saying this, the Court in no way condemns class plaintiffs' actions. On the contrary, the Court is most appreciative of class plaintiffs' efforts in bringing serious misconduct to the Court's attention. However, under section 1927 and Rule 11, the Court does not have authority to grant class plaintiffs' request for attorneys' fees and costs for these offensive actions.

Because of the Court's determination that it can only award fees and costs for defensive actions, the Court requested that class counsel submit a revised schedule of fees and costs.[8] The settlement of the *Itel Securities Litigation* that actions that clas plaintiffs took before October 18, 1983 can be reasonably interpreted to be actions in defense of the settlement. As such, the Court has the authority to award fees and costs related to these actions. Under section 1927 and Rule 11, the Court cannot and will not award attorneys' fees and costs for any actions taken after October 18, 1983.[9] The court also requested that counsel for the Itel Corporation submit a schedule of fees and costs incurred in defending against Mr. Bader's actions.[10]

Both class counsel and counsel for Itel have submitted detailed declarations in response to the Court's request. After carefully reviewing the declarations, the Court has concluded that the amount requested, even just for defensive actions, is far out of proportion to the size of the wrong perpetrated by Mr. Bader. If the Court granted all attorneys' fees and costs incurred before October 18, 1983, the total sanction imposed on Mr. Bader would be approximately $95,000. The Court finds that this amount far exceeds the proper amount of sanctions for Mr. Bader's misconduct.

The Court finds that sanctions of $10,000. payable to class counsel and $5,000 payable to counsel for the Itel Corporation are commensurate with the extent of Mr. Bader's wrongful conduct in this litigation. The Court will not impose any sanctions against Mr. Murphy. Though Mr. Murphy's conduct was far from exemplary, the Court finds that his conduct does not warrant the imposition of sanctions.

In making this Order, the Court wishes to make two observations. First, the Court recognizes that this award is much less than class plaintiffs had requested. By making this Order, the Court does not wish to denigrate the effort made by class counsel. Counsel for the plaintiff class has alerted the Court to a very serious instance of attorney misconduct. However, the Court will not impose excessive sanctions to reimburse counsel for expenditures they chose to make. Class counsel cannot very well create this entire post-judgment proceeding and then say that Mr. Bader has to pay for it.

Second, the Court wants to be very clear in its total condemnation of Mr. Bader's conduct. As noted erlier, it is conduct such as Mr. Bader's that section 1927 and Rule 11 are designed to prohibit and punish. The Court believes that Mr. Bader acted in a vexatious manner and has proceeded in bad faith on an number of occasions in the *Itel Securities Litigation.* Specifically the Court finds that Mr. Bader repeatedly took actions in the *Itel Securities Litigation* for the sole purpose of obtaining fee-related concessions in connection with other litigation. Because of the seriousness of this finding, the Court has considered referring this case to the New York Bar Association for disciplinary action. In light of Mr. Bader's history in this type of litigation, the Court thinks that the Bar Association might well act unfavorably toward Mr. Bader. But, although the Court finds Mr. Bader's conduct most improper, the Court will not refer the matter to the Bar Association. Rather, the Court hopes that the heavy sanctions the Court imposes in this case put Mr. Bader on notice that the courts will not tolerate his misconduct any longer.

The Court anticipates that Mr. Bader will pursue an appeal of this Order.[11] To avoid unnecessary motions, and further unnecessary expense, the Court grants a stay of this order to allow Mr. Bader to file an appeal in the Court of Appeals for the Ninth Circuit.

For the reasons stated in the body of this Opinion and Order, and for good cause appearing, the Court hereby directs I. Walton Bader to pay sanctions in the amount of $10,000 to class counsel and $5,000 to counsel for the Itel Corporation.

Further, the Court stays this Order until the Court of Appels rules on this matter.

IT IS SO ORDERED.

Dated: October 2, 1984.

S/ROBERT P. AGUILAR
ROBERT P. AGUILAR
United States District Judge

FOOTNOTES

1. Throughout the course of this Opinion and Order, the Court will refer to "Mr. Bader's actions." The Court recognizes that other individuals were involved. However, from its review of the record, the Court has found that Mr. Bader was the prime mover in the actions that are the focus of this Opinion and Order.

2. Mr. Murphy is the only other individual from whom class plaintiffs seek to recover attorneys' fees, costs, and sanctions.

3. Class plaintiffs originally sought attorneys' fees, costs, and sanctions against Seymour Licht. However, in December 1983, class plaintiffs settled their claims against Mr. Licht. The Court mentions Mr. Licht for the purpose of reciting the allegations that form the basis of class plaintiffs' claims against Mr. Bader and Mr. Murphy. The inclusion of Mr. Licht is not meant as a judgment about Mr. Licht's behavior.

4. Mr. Bader was Mr. Licht's attorney and counsel for the Ad Hoc Bondholders Committee. However, Mr. Bader and Mr. Licht severed their relationship during the course of these post-judgment proceedings.

5. Although Mr. Licht and Mr. Phelps ultimately resolved their dispute with Itel in Mr. Bader's absence, Mr. Bader did, in

fact do considerable legal work on behalf of the Bondholders Committee. Mr. Bader filed an insolvency proceeding in Curacao against an Itel subsidiary located in Curacao. Mr. Bader also filed an action in Delware state court asserting that Itel subsidiaries should not be permitted to upstream their assets to the parent corporation because the subsidiaries were not in bankruptcy. It is generally agreed that these legal actions provided the impetus to the negotiations that eventually led to the settlement between the bondholders and Itel.

6. Mr. Bader's fee arrangement with Mr. Licht, Mr. Phelps and the Bondholders Committee was wholly contingent. The agreement that Mr. Bader entered into states that "The amount of attorneys' fees will either be determined by agreement between the parties or by an order of an appropriate court based upon the benefits obtained by said bondholders by reason of said representation."

Mr. Bader had amassed a considerable amount of attorneys' fees and faced the prospect of getting them from his clients, perhaps by way of another lawsuit, unless he cound find a way to get them from the Itel Corporation or from court. Thus, the fee arrangement meant that both Mr. Bader and Mr. Licht had a very strong interest in getting the fees through an agreement with the Itel Corporation or from a court.

7. Throughout the course of this post-judgment proceeding, Mr. Bader has maintained that he is entitled to a jury trial on the charges leveled against him by class plaintiffs. Mr. Bader argues that if he is being charged with breach of contract and/or abuse of process, then he is entitled to a jury under the Seventh Amendment of the United States Constitution.

The Court has studied the Ninth Circuit's decisions on the granting of attorneys' fees, costs, and sanctions. The Court has found no indication that there is an entitlement to a jury trial on such matters. Of course, such proceedings do entail some factual determinations. In Roadway Express v. Piper, 447 U.S. 752 (1980), the Supreme Court required that the court conduct a hearing and that the accused have the right to address the court with respect to the allegations. *Accord,* Barnd v. City of Tacoma, 664 F.2d 1339 (9th Cir. 1980); U.S. v. Blodgett, 709

F.2d 608 (9th Cir. 1983). The Court has afforded Mr. Bader the opportunity for a hearing and to address the Court. Nothing more, including a jury trial, is required.

8. Class plaintiffs' original request included all the attorneys' fees incurred in connection with this post-judgment proceeding.

9. The Court recognizes that this is not a perfect division into "defensive" and "offensive" actions. However, the Court is not in a position to make a more exacting division, and the Court believes that using the October 18, 1983 date produces a reasonably accurate representation of the division of counsels' time.

10. For reasons unknown to the Court, counsel for the Itel Corporation did not seek an award of attorneys' fees and costs by way of a request for sanctions. Nevertheless, the Court knows and finds that the Itel Corporation was forced to incur legal expenses as a result of Mr. Bader's wrongful conduct. Further, the Court finds that counsel for the Itel Corporation has done an admirable job throughout this difficult litigation, and the Court therefore believes that counsel for Itel is just as entitled to reimbursement as class plaintiffs' counsel. For this reason, the Court requested a statement of the legal costs Itel incurred, and the Court will include Itel's counsel in the award of fees and costs against Bader.

11. The Court notes that Mr. Bader has filed an appeal of virtually every Order this Court has issued in the course of this litigation.

APPENDIX B—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In re: ITEL SECURITIES LITIGATION. I. WALTON BADER, and BADER AND BADER, *Appellants,* v. ITEL CORPORATION, and CLASS PLAINTIFFS, *Appellees.*	Nos. 84-1505 84-2620 84-2714 84-2780 D.C. No. CV-79-2168 RPA (Northern California) ORDER AND OPINION

Argued and Submitted
March 13, 1986—San Francisco, California

Decided April 8, 1986
Order Filed June 13, 1986

Before: Richard H. Chambers, Anthony M. Kennedy and Jerome Farris, Circuit Judges.

Opinion by Judge Farris

Appeal from the United States District Court
for the Northern District of California
Robert P. Aguilar, District Judge, Presiding

SUMMARY

Attorneys/Courts and Procedure

Appeal from an award of sanctions. Affirmed.

OPINION

FARRIS, Circuit Judge:

This is an appeal from an award of sanctions imposed by the district court following settlement of a massive class action against the Itel Corporation. Attorney I. Walton Bader challenges an order of the district court awarding sanctions in the amount of $10,000 to counsel for class plaintiffs and $5000 to counsel for Itel Corporation, said sanctions to be paid by Bader personally. The facts underlying the award of sanctions are set out in detail in the Opinion and Order of the district court. *In re Itel Securities Litigation,* 596 F.Supp. 226 (N.D. Cal. 1984).

The district court found, *inter alia,* (1) that Bader's conduct during the course of the litigation "constitute[d] bad faith," and (2) that Bader "repeatedly took actions in the *Itel Securities Litigation* for the sole purpose of obtaining fee-related concessions in connection with other litigation." Accordingly, the court awarded sanctions against Bader pursuant to (1) its "inherent power to award attorneys' fees as a means of protecting the integrity of the judicial process," (2) Fed. R. Civ. P. 11, and (3) 28 U.S.C. § 1927. We review whether the award is justified under any of these theories.

The order appealed from finally disposes of all claims brought by the class plaintiffs in the post-judgment proceed-

ings. We have jurisdiction pursuant to 28 U.S.C. § 1291. The order was entered on October 16, 1984. Bader filed a timely notice of appeal on October 26, 1984.

STANDARD OF REVIEW

[1] We recently summarized the standards governing review of an award of sanctions under Fed. R. Civ. P. 11:

> If the facts relied upon by the district court to establish a violation of the Rule are disputed on appeal, we review the factual determinations of the district court under a clearly erroneous standard. If the legal conclusion of the district court that the facts constitute a violation of the Rule is disputed, we review the legal conclusion *de novo*. Finally, if the appropriateness of the sanction imposed is challenged, we review the sanction under an abuse of discretion standard.

Zaldivar v. City of Los Angeles, 780 F.2d 823, 828 (9th Cir. 1986). These same standards govern review of sanctions imposed pursuant to 28 U.S.C. § 1927. *United States v. Associated Convalescent Enterprises, Inc.*, 766 F.2d 1342, 1345 (9th Cir. 1985); *Lone Ranger Television, Inc. Program Radio Corporation*, 740 F.2d 718, 727 (9th Cir. 1984). A finding of bad faith, prerequisite to assessment of attorneys' fees under the court's inherent power, "will be overturned only if clearly erroneous." *Masolosalo by Masolosalo v. Stonewall Insurance Company*, 718 F.2d 955, 957 (9th Cir. 1983) *citing Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293, 1298 (9th Cir.), *cert. denied*, 459 U.S. 990 (1982).

DISCUSSION

Bader does not challenge the district court's finding that he "repeatedly took actions in the *Itel Securities Litigation* for the sole purpose of obtaining fee-related concessions in con-

nection with other litigation." Nor does he contend that the district court abused its discretion in setting the amount of the awards.

[2] Bader contends that the district court lacked jurisdiction to award the challenged sanctions "because the involvement of Bader and his clients terminated in this matter prior to the making of the application involved by class counsel." In support of this contention Bader cites *Overnite Transportation Company v. Chicago Industrial Tile Company*, 697 F.2d 789 (7th Cir. 1983), for the proposition that a court "cannot . . . retain jurisdiction of a claim [i.e., application for sanctions] after discontinuance of the action where misconduct is claimed." Bader misreads the holding of *Overnite Transportation*. The court held only that "a party must bring a motion for fees and costs either before an appeal is perfected or during the pendency of the appeal on the merits." 697 F.2d at 793. There is absolutely no hint in *Overnite Transportation* that a lawyer may escape sanctions for misconduct simply by withdrawing from a case before opposing counsel applies for sanctions. Here, the application for sanctions was filed while the appeal on the merits was pending.

[3] Bader also contends that the trial court lacked jurisdiction to award attorneys' fees to Itel Corporation as Itel "made no application for such relief." Rule 11 specifically provides that a court may impose sanctions "upon its own initiative." Fed. R. Civ. P. 11. Sanctions may also be awarded sua sponte under the court's inherent power. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980).

Bader's challenges to the jurisdiction of the district court are without merit.

[4] Bader contends that the district court "applied incorrect standards" in awarding sanctions "since there was ample support for all actions taken by him." His argument seems to be that the court's finding of bad faith was clearly erroneous as

his actions, even if improperly motivated, were legally supportable.

The imposition of sanctions under the inherent power of the court is proper where counsel has " 'willfull[y] abuse[d] judicial process' or otherwise conducted litigation in bad faith." *Toombs v. Leone*, 777 F.2d 465, 471 (9th Cir. 1985) (quoting *Roadway Express*, 447 U.S. at 766). *See also Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 258-59 (1975) (quoting *F.D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116, 129 (1974) (a court may impose sanctions against a party that has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons"). Bader's admission that he filed objections to the *Itel Securities Litigation* to exact fee concessions in an action pending before another court is alone sufficient to support a finding of bad faith. For purposes of imposing sanctions under the inherent power of the court, a finding of bad faith "does not require that the legal and factual basis for the action prove totally frivolous; where a litigant is substantially motivated by vindictiveness, obduracy, or *mala fides*, the assertion of a colorable claim will not bar the assessment of attorney's fees." *Lipsig v. National Student Marketing Corp.*, 663 F.2d 178, 182 (D.C. Cir. 1980) (per curiam) (sustaining an award of fees "for general obstinacy unconnected with the merits of the case"). Bader's reliance on California cases treating the elements of the tort of abuse of process is misplaced.

Bader allegedly entered into a series of agreements with Itel in which Itel made concessions concerning the attorneys' fees sought by Bader in exchange for Bader's assurance that he would not interfere with the settlement of the *Itel Securities Litigation*. In awarding sanctions against Bader, the district court discussed the alleged agreements and their breach by Bader. Bader contends that the district court violated his Seventh Amendment right to a jury trial by resolving contested issues of fact concerning the existence and breach of these agreements.

[5] The district court did not adjudicate a contract dispute. The award of sanctions was based on Bader's conduct before the district court, not upon Bader's alleged breaches of promises to Itel. The Seventh Amendment is not implicated.

In keeping with his unfounded view that the trial court adjudicated breach of contract claims, Bader also argues (1) that the alleged agreements were "void as against public policy" and should not have been enforced by the court, (2) that class counsel were not third party beneficiaries of the agreements involved and thus had no standing to claim breach of the agreements by Bader, and (3) that he never breached the agreements, in any event. These contentions are without merit as no contract was enforced by the district court.

[6] Finally, Bader asserts that the petitions clause of the First Amendment guarantees the right of "any citizen" to "present[] any petition to any Governmental Agency, however frivolous, without penalty." Thus, he argues, a court may not impose sanctions "even if there is no basis for the action taken by a litigant."

This contention is frivolous. The power of the federal courts to sanction attorney misconduct, be it frivolous litigation or contemptuous behavior, is beyond doubt. *See, e.g., Roadway Express,* 447 U.S. 752; *Alyeska,* 421 U.S. 240.

CONCLUSION

Our careful review of the record reveals that there is ample support for the findings of the district court. The legal authority cited by Bader is uniformly inapposite. This appeal is frivolous. Moreover, Bader's briefs contain numerous misrepresentations of the record and mischaracterizations of precedent.

Pursuant to Fed. R. App. P. 38, appellees will be awarded costs and attorneys' fees in a sum to be determined upon our

receipt and review of applications accompanied by affidavits detailing expenditures on appeal. Appellees shall have 14 days within which to file such applications. Appellant shall have 7 days within which to respond.

AFFIRMED.

APPENDIX C—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING THE PETITIONERS' PETITION FOR REHEARING *EN BANC*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In Re:
ITEL SECURITIES LITIGATION.

I. WALTON BADER, and BADER and BADER,
Appellants,

v.

ITEL CORPORATION, and CLASS PLAINTIFFS,
Appellees.

ORDER

CA No. 84-1505, 84-2620, 84-2714, 84-2780

DC No. CV-79-2168 RPA (Northern California)

Before: CHAMBERS, KENNEDY, and FARRIS, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Kennedy and Farris have voted to reject the suggestion for a rehearing en banc and Judge Chambers recommends rejection.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

A TRUE COPY
ATTEST 8-19-86
CATHY A. CATTERSON
Clerk of Court
by: s/ M. Wheeler
Deputy Clerk

APPENDIX D—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AWARDING FURTHER FRAP RULE 38 SANCTIONS AGAINST PETITIONERS FOR AN ALLEGEDLY "FRIVOLOUS APPEAL."

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re:
ITEL SECURITIES LITIGATION.

I. WALTON BADER, and BADER and BADER,
Appellants,

vs.

ITEL CORPORATION, and CLASS PLAINTIFFS,
Appellees.

ORDER AWARDING ATTORNEYS FEES TO THE DAVID B. GOLD FIRM

Nos. 84-1505, 84-2620, 84-2714, 84-2780

Appeal from the United States District Court
for the Northern District of California

Before: CHAMBERS, KENNEDY, and FARRIS, Circuit Judges.

We have previously ordered that fees be paid to counsel for the Itel Corporation and the class plaintiffs pursuant to Rule 38 of the Federal Rules of Appellate Procedure. Having considered the submissions of the attorneys for the appellees, we award fees as follows: to David B. Gold, A Professional Law Corporation, the sum of $8,000; to the firm of Pettit & Martin, the sum of $4,500. These sums shall be paid by appellant I. Walton Bader, and the firm of Bader & Bader, and may not be charged to or reimbursed by the clients of I. Walton Bader or the clients of Bader & Bader, directly or indirectly.

The court has affirmed the findings of the district court that the action was brought in bad faith. We have found further

that the appeal is frivolous, and that the briefs filed by appellant Bader contain numerous misrepresentations of the record and mischaracterizations of precedent.

A copy of this order and of our opinion on the merits of the appeal is forwarded to the State Bar of the State of New York for its information.

Appellees shall also be entitled to costs incurred on appeal upon timely filing of the bill of costs.

APPENDIX E—ORDER OF THE SUPREME COURT OF THE UNITED STATES EXTENDING THE TIME FOR PETITIONERS TO FILE THEIR PETITION FOR A WRIT OF CERTIORARI

Supreme Court of the United States

No. A-143

I. WALTON BADER AND BADER & BADER,
Applicants

v.

ITEL CORPORATION, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 5, 1986.

s/ William H. Rehnquist
Associate Justice of the Supreme
Court of the United States

Dated this 27th
day of August, 1986.

APPENDIX F—COPY OF DOCKET ENTRIES OF THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN *LICHT VS. ITEL NAVIGATION*

10/01/86 REGISTER IN CHANCERY

CASE FILE LISTING

CASE NO. 6873, CASE TYPE A, DERIV. ACTION 2.
ACTIVITY: State Inactive, Date 10-11-83, Reason 26,
Start Date 7-07-82, Calendar Sect Call * Date 2-01-84
CHANCELLOR CODE 0 DATE 10/11/83 CHANCELLOR OF DISMISSAL 5, TYPES OF RELIEF SPEC 19
ATTORNEYS PLAINTIFF 0629, ATTORNEYS DEFENDANT 3001 1812 0646, SHORT PLAINTIFF CAPTION SEYMOUR LICHT, SHORT DEFENDANT CAPTION ITEL NAVIGATION FINANCE INC., ETAL, LONG PLAINTIFF CAPTION SEYMOUR LICHT, IN BEHALF OF HIMSELF AND ALL SIMILARLY SITUATED AND CIRCUMSTANCED.

CASE FILE LISTING

LONG DEFENDANT CAPTION
ITEL NAVIGATION FINANCE, INC. (A DELAWARE C MERRILL, PETER S. REDFIELD, GARY B. FRIEDMA R. DOUGLAS NORBY, GERLAD R. ALBERSON, WILLI PATRICK B. MCMANUS, THOMAS S. TAN, HERMAN H BEMESDERFER, MICHAEL BRISTOW, SUSAN R. MOOR MANN,
DOCKET ENTRIES

1 07-07-82 COMPLAINT FOR PRELIM. INJ.

2 07/08/82 ISSUED SUMMONS TO SHER. OF N.C. CO. COPY

3 07/08/82 ISSUED 3114 SUMMONS TO SHER. OF N.C. CO. 15 COPIES

3 07/14/82 SERVED ALL INDIVIDUALS BY SERVING CORP. TRUST CO.

4 07/09/82 REGISTER'S CERTIFICATE—FILED

5 07/27/82 STIP. AND PROP. ORDER TO EXTEND TIME TO 8-27-82

5 07/27/82 ORDER SIGNED BY V.C. LONGOBARDI ON 7-29-82

6 08/17/82 STIP. AND PROP. ORDER TO EXTEND TIME TO 1-3-83

6 08/17/82 ORDER SIGNED BY V.C. LONGOBARDI ON 8-25-82

7 02/22/83 STIP. AND PROP. ORDER TO EXTEND TIME TO 04-15-83

7 02/22/83 ORDER SIGNED BY V.C. LONGOBARDI DTD. 03-01-83

8 03/29/83 NOTICE OF MOTION, MOTION CONDITIONALLY CERTIFYING FOR THE PURPOSE OF SETTLEMENT, DISCONTINUING WITH PREJUDICE—FILED

9 02/22/83 50 STATUS LTR. FROM W.O. LAMOTTE, III DTD. 02-22-83

10 02/23/83 50 STATUS LTR. FROM E.T. CICONTE DTD. 02-22-83

11 04/14/83 NOTICE OF TAKING TESTIMONY—FILED

12 04/15/83 LTR. TO I. WALTON BADER FROM WILLIAM O. LAMOTTE, III

13 04/28/83 NOTICE OF MOTION, MOTION TO INTERVENE (ROBERT G. MORRIS)

14 05/04/83 LTR. TO V.C. LONGOBARDI FROM EDWARD T. CICONTE DTD.

15 05/06/83 NOTICE AND MOTION TO DISMISS-FILED

16 05/10/83 NOTICE, MOTION TO BE RELIEVED OF REPRESENTATION OF

17 05/31/83 LTR. TO V.C. LONGOBADI FROM WILLIAM O. LAMOTTE, III DTD. 05-28-83-FILED

18 06/02/83 LTR. TO V.C. LONGOBARDI FROM I. WALTON BADER DTD. 05-31-83-FILED

19 06/22/83 TRANSCRIPT OF PROCEEDINGS TAKEN 06-02-83 - FILED

20 07/11/83 LTR. TO V.C. LONGOBARDI FROM I. WALTON BADER DTD. 06-30-83 - FILED

21 08/11/83 STIP. AND PROP. ORDER FOR FEE APPLICATION

21 08/11/83 ORDER SIGNED BY V.C. LONGOBARDI DTD. 08-16-83

22 08/31/83 LTR. TO V.C. LONGOBARDI FROM WILLIAM O. LAMOTTE, III DTD. 08-31-83 - FILED

23 09/06/83 AFFIDAVIT OF WILLIAM O. LAMOTTE, III—FILED

24 09/06/83 AFFIDAVIT OF WILLIAM O. LAMOTTE, III VOL. II-FILED

25 09/07/83 LTD. TO V.C. LONGOBARDI FROM I. WALTON BADER DTD.

26 09/07/83 DECLARATION OF CHRISTOPHER SCHMICH RE REQUESTS FOR DECLARATION OF MICHAEL F. PERLIS—FILED

28 09/07/83 AFFIDAVIT OF JAMES L. RUSSELL-FILED

29 09/07/83 AFFIDAVIT OF DAVID V. KOLOVAT-FILED

30 09/26/83 LTD. TO V.C. LONGOBARDI FROM WILLIAM O. LAMOTTE, III DTD. 09-26-83 - FILED

31 09/26/83 SECOND AFFIDAVIT OF WILLIAM O. LAMOTTE, III - FILED

32 09/26/83 TRANSCRIPT OF PROCEEDINGS TAKEN 09-07-83 - FILED

33 09/06/83 ORDER OF DISMISSAL RETURNED UN-SIGNED ON 10-11-83

34 09/07/83 ORDER OF DISMISSAL RETURNED UN-SIGNED ON 10-11-83

35 10/11/83 LTR. TO V.C. LONGOBARDI FROM I. WALTON BADER DTD. 10-03-83 - FILED

37 10/11/83 SECOND AFFIDAVIT OF WILLIAM O. LAMOTTE, III - FILED

38 10/11/83 ORDER OF DISMISSAL SIGNED BY V.C. LONGOBARDI DTD. 10-11-83 FILED

39 10/28/83 LTR. TO V.C. LONGOBARDI FROM I. WALTON BADER DTD. 10-11-83 - FILED

APPENDIX G—U.S. CONSTITUTION

US CONSTITUTION AMENDMENT 1

AMENDMENT [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

US CONSTITUTION AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

US CONSTITUTION AMENDMENT 7

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

APPENDIX H
RULE 11 FEDERAL RULES OF CIVIL PROCEDURE

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleding, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished.
The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleding, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the resonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.